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Supreme Court, U.S.
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No. 04-803

IN THE

Supreme Court of the United States

MAISIE SHENANDOAH, *et al.*,
Petitioners,

v.

ARTHUR RAYMOND HALBRITTER, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

JURISDICTION 1

STATEMENT OF THE CASE 1

A. Habeas Petition 1

B. Decisions Below 2

REASONS FOR DENYING A WRIT OF CERTIORARI 3

I. THERE IS NO SPLIT IN THE CIRCUITS TO RESOLVE. 5

II. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT, WHICH HAS SETTLED THE LAW REGARDING CLAIMS UNDER THE INDIAN CIVIL RIGHTS ACT. 6

III. PETITIONERS FAILED TO EXHAUST TRIBAL REMEDIES. 8

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Dry v. CFR Court of Indian Affairs, 168 F.3d 1207 (10th Cir. 1999).....7

Dodge v. Nakai, 298 F. Supp. 26 (D. Ariz. 1969).....5, 6

Edmunds v. Won Bae Chang, 509 F.2d 39 (9th Cir. 1975).....6

Garcia v. Akwesasne Hous. Auth., 268 F.3d 76, 81 (2d Cir. 2001).....9

Gardner v. Ute Tribal Court Chief Judge, 2002 U.S. App. LEXIS 1097 (10th Cir. Jan. 25, 2002).....6

Garry v. Geils, 82 F.3d 1362 (7th Cir. 1996).....7

Gisslen v. City of Crystal, 345 F.3d 624 (8th Cir. 2003).....7

Harts v. Indiana, 732 F.2d 95 (7th Cir. 1984).....6

Harvey v. Star, No. 95-2283, 1996 U.S. App. LEXIS 23870 (10th Cir. Sept. 10, 1996).....9, 10

Hensley v. Municipal Court, 411 U.S. 345 (1973).....6, 7

Jones v. Cunningham, 371 U.S. 236 (1963).....6, 7

Kaminski v. United States, 339 F.3d 84 (2d Cir. 2003).....6

Lillios v. New Hampshire, 788 F.2d 60 (1st Cir. 1986).....6

Longie v. Pearson, No. 99-4142, 2000 U.S. App. LEXIS 7255 (8th Cir. Apr. 21, 2000) 9

Moore v. Nelson, 270 F.3d 789 (9th Cir. 2001) 6

National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 856-57 (1985) 10

Nixon v. Adm'r of Gen. Servs., 433 U.S. 425 (1977) 7

Oneida Indian Nation v. Hill, 1990 U.S. Dist. Lexis 10813 (N.D.N.Y. 1990) 9

Poodry v. Tonawanda Band, 85 F.3d 874 (2d Cir. 1996) 6, 7

Santa Ynez Band v. Torres, 262 F. Supp.2d 1038 (C.D. Cal. 2002) 5

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) 2, 3, 4

Selective Service v. Minn. PIRG, 468 U.S. 841 (1984) 8

United States v. Markiewicz, 978 F.2d 786 (2d Cir. 1992) 9

STATUTES

25 U.S.C. § 1301 1

25 U.S.C. § 1303 ..... 1, 3, 4

28 U.S.C. § 1331 1

28 U.S.C. § 1343(3) 1

28 U.S.C. § 1343(4) 1

28 U.S.C. § 2241 7

42 U.S.C. § 1983 7

JURISDICTION

For the reasons discussed below, there is no subject matter jurisdiction.

STATEMENT OF THE CASE

A. Habeas Petition

Petitioners filed a habeas corpus action under the Indian Civil Rights Act, 25 U.S.C. §§ 1301 *et seq*. (ICRA), naming as respondents members of the government of the Oneida Indian Nation of New York, the Nation's housing corporation and its director, two tribal judges (the Honorable Stewart F. Hancock and the Honorable Richard D. Simons, both retired from the New York Court of Appeals), the Nation's prosecutor, the Nation's Public Safety Commissioner, and numerous Nation police officers. (CAJA 29-55).[1] 25 U.S.C. § 1303 provides: "The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe."

Petitioners were unclear about what order of detention they sought to challenge. They generally alleged in their petition that the Nation's government had enacted an ordinance providing for inspection of all housing located on land owned by the Nation along Territory Road and providing for the removal of any housing found to be unsafe and irreparable, had enacted another ordinance providing subsidies and loan guarantees to facilitate the construction of new housing, and, as political retaliation, had denied petitioners those financial

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[1] Petitioners' complaint also sought an injunction against violations of ICRA, the United States and New York Constitutions, and the Great Law of Peace of the Haudenaosaunee. (*Id.* at 30, ¶ 1). The complaint alleged jurisdiction under 28 U.S.C. §§ 1331, 1343(3) and (4), predicating federal question jurisdiction on the National Environmental Policy Act and the Administrative Procedure Act as well as ICRA. (*Id.*, ¶ 4).

benefits as members not in good standing. The petition claimed that all of this constituted "detention by order of an Indian tribe" under ICRA because petitioners could not afford (without subsidies) to build housing to replace their trailers, all but one of which the Nation's Commissioner of Public Safety found to be dangerous after inspections and ordered removed (the Nation Court subsequently affirmed that order).[2]

B. Decisions Below

The district court dismissed the petition. (Pet. App. A-1-17). The court noted that the Indian Civil Rights Act provides only one federal court remedy for violations of the Act, a writ of habeas corpus. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). ICRA restricts the writ's availability to those who are in detention, which the district court accepted as the equivalent of the custody requirement applicable to all writs of habeas corpus. The court held that *actual* physical confinement is *not* required but that petitioners' allegations regarding housing did not amount to detention under any standard. (Pet. App. A-11-13). The court also held the Nation's housing ordinance requiring removal of dangerous housing is not a bill of attainder because

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[2] In 2000, the Nation enacted an ordinance "to eliminate dilapidated and unsafe housing on that portion of Nation lands commonly referred to as Territory Road." Whether members are in good standing or not, they are entitled under the ordinance to relocation assistance and to fair market compensation for any unsafe housing that must be removed (in no event less than $1,000). (CAJA 89-90). In 1998, the Nation established a program of financial subsidies and loan guarantees to facilitate the construction of housing. (*Id.* at 374). Also in 1998, the Nation enacted a separate ordinance adopting the National (now International) Building Code. (*Id.* at 91-96). The Nation trial and appellate court decisions authorizing the housing inspections and approving the condemnation orders are found at CAJA 227-40 (order authorizing inspection) (Hancock, J.); 241-45 (affirming inspection order) (Simons, J.); 98-108 (upholding condemnation order) (Hancock, J.); 740-41 (authorizing additional inspections); CA Special Appendix (SPA2) 16 (order upholding additional condemnations).

it does not "target individuals nor does it 'punish' persons in the traditional prohibitive sense." (*Id.* at A-13). The court specifically addressed the circumstances of the one petitioner who was arrested and whose trailer was removed. The court noted that the Nation offered her subsidized rental housing in the Nation's new housing development (CAJA 79), and that she refused. (Pet. App. A-4-5, n.1). The court also noted that she pleaded guilty in Nation court and was sentenced to time served and told that she was "free to go" long before suit was filed. (*Id.* at A-5).

The court of appeals affirmed in a unanimous decision (Leval, Calabresi & Van Graafeiland, JJ). (Pet. App. A-18-23). The court held that enforcement of the Nation's housing ordinance involved "economic restraint" and "did not constitute a sufficiently severe restraint on liberty" to satisfy the detention/custody requirement for the writ of habeas corpus. (Pet. App. A-22). The court further held that the Nation's ordinance requiring removal of unsafe housing is not a bill of attainder because it applies to all who live along Territory Road "and cannot be said to single out any individuals." (Pet. App. A-23). *See also* CAJA 75 (ordinance applies to all homes on "32 acres"); *id.* at 766-67 (home of tribal council member was condemned); *id.* at 927 (one of the petitioners' trailers passed inspection). Rehearing was denied. (Pet. App. A-24).

REASONS FOR DENYING A WRIT OF CERTIORARI

The law governing suits under the Indian Civil Rights Act is settled. In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 70 (1978), the Court held that there is no private right of action under the Act, which the Court construed to provide a single, exclusive remedy – a writ of habeas corpus pursuant to 25 U.S.C. § 1303. "Congress, aware of the intrusive effect of federal judicial review upon tribal self-government, intended to create only a limited mechanism for such review, namely, that provided for expressly in § 1303." *Id.* at 70. Petitioners do not

ask the Court to overrule *Santa Clara*. Nor do petitioners dispute that, under the explicit terms of the Act, the writ to which they are limited by *Santa Clara* is available only "to test the legality of detention by order of an Indian tribe." 25 U.S.C. § 1303.

In their clearest statement of their position, petitioners claim they were entitled to a writ of habeas corpus because denial of financial benefits to build new houses produces a "cumulative impact" that constitutes a bill of attainder. Pet. 10-11. Petitioners maintain that a bill of attainder is "[b]y definition" sufficient to establish detention/custody. Pet. 15; *see also, id.* at 21, 24, 25, 27. Neither proposition warrants this Court's review.[3]

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[3] S. Ct. Rule 14.4 provides that "[t]he failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for this Court to deny a petition." Here, the petition is not accurate, brief, or clear. The absence of brevity and clarity is apparent on the face of the petition. Inaccuracies are liberally sprinkled throughout, as suggested by the absence of record citation for most of the incendiary statements in the petition. It is impossible, within the limits of a brief in opposition of reasonable length to list all of the misstatements of law and fact in the petition, however the following misstatements are of the most direct relevance to what issues would be before the Court if certiorari were granted, S. Ct. Rule 15.2:

- The petition (at p. 5) asserts that the Nation pronounced petitioners guilty of "treason." There is no citation to support that statement, and it is false; petitioners never were accused of, tried for or convicted of treason.
- The petition asserts (at p. 9) that the Nation's housing code consisted of selective, tailored standards "specifically chosen to fail petitioners' homes." There is no citation to support that statement; it is false; the Nation adopted the National (now International) Building Code, without change. Oneida Indian Nation Amended Health and Safety Ordinance, No. O-94-01B, § 5.3 (CAJA 93). Inspections are conducted by an

Footnote cont'd

I. THERE IS NO SPLIT IN THE CIRCUITS TO RESOLVE.

Petitioners assert: "This case presents the cleanest circuit split imaginable." Pet. 21. No citation to a decision of any court of appeals follows this strong statement. Instead, petitioners cite two district court opinions. There is, then, no split in the circuits. Moreover, neither cited district court decision involves issuance of a writ of habeas corpus, nor does either decision speak to the detention/custody analysis principally underlying the court of appeals' decision in this case. *See Santa Ynez Band v. Torres*, 262 F. Supp. 2d 1038, 1046-47 (C.D. Cal. 2002) (tribal member could assert the Indian Civil Rights Act as defense in civil action brought by tribe seeking order compelling member's removal from reservation); *Dodge v. Nakai*, 298 F. Supp. 26 (D. Ariz. 1969) (pre-*Santa Clara*

Footnote cont'd

independent contractor who serves as a registered code compliance officer for other local governments. (*Id.* at 104).

- Petitioners assert (at p. 11) that they cannot live on Nation lands and (at p. 19) that they will be homeless if they leave their current homes. There is no citation to support these statements, and they are false; petitioners refused to complete applications for housing at the Nation's Village of the White Pines or at other Nation-owned housing, all of which is on the Nation's lands at rents prorated to petitioners' ability to pay. (CA Supp. SPA-8).
- The petition (at p. 12) asserts that one petitioner was arrested and jailed when she protested an inspection of her trailer. There is no citation to support that statement, and it is false; that person was arrested when she assaulted a police officer, immediately released on her recognizance, and arrested again only after she refused to appear in the Nation Court for trial. (Pet. App. A-4-5).
- The petition asserts (at p. 8) that respondents conceded that housing ordinances were passed with the intention of singling out petitioners and removing their trailers; there is no citation to support that statement, and it is false; respondents filed the affidavit of the Nation lawyer alleged to have said that, and he flatly denied it. (CAJA 663).

decision permitting implied private right of action under Indian Civil Rights Act).

II. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT, WHICH HAS SETTLED THE LAW REGARDING CLAIMS UNDER THE INDIAN CIVIL RIGHTS ACT.

Petitioners do not identify a decision of this Court that conflicts with the decision of the court of appeals. With regard to the detention/custody question, petitioners identify no decision of this Court holding that removal of unsafe housing or denial of financial benefits to build new housing can place a person in detention/custody.[4] Indeed, the petition refers only to two decisions of this Court concerning custody in the habeas corpus context, *Jones v. Cunningham*, 371 U.S. 236 (1963), and *Hensley v. Municipal Court,* 411 U.S. 345 (1973). Pet. 28, 30. These are the two cases on which the court of appeals had relied in *Poodry v. Tonawanda Band*, 85 F.3d 874, 893-94 (2d Cir. 1996). The court of appeals below heavily relied on *Poodry* and *accepted* petitioners' argument that actual physical confinement

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[4] The court of appeals' decision is consistent with other circuit decisions holding the writ of habeas corpus unavailable to remedy complaints regarding property, financial matters, licensing issues and the like. *See Moore v. Nelson*, 270 F.3d 789, 791 (9th Cir. 2001) (tribal court ordered seizure and sale of the petitioner's truck, loader and a motor home to satisfy fine imposed for unlawful logging; petitioner was not subject to "detention" within the meaning of 25 U.S.C. § 1303); *see also Kaminski v. United States*, 339 F.3d 84 (2d Cir.) (order of restitution not custody), *cert. denied,* 540 U.S. 1084 (2003); *Gardner v. Ute Tribal Court Chief Judge*, No. 01-4037, 2002 U.S. App. LEXIS 1097 (10th Cir. Jan. 25, 2002) (order denying plaintiff right to practice law in tribal court not custody); *Lillios v. New Hampshire*, 788 F.2d 60 (1st Cir. 1986) (fines and suspension of driver's license not custody); *Harts v. Indiana*, 732 F.2d 95, 96 (7th Cir. 1984) (loss of driving privileges not custody); *Edmunds v. Won Bae Chang*, 509 F.2d 39, 41 (9th Cir. 1975) (fine not custody).

is not required for issuance of the writ, deciding only that petitioners had not adequately pleaded detention or custody by challenging housing removal and the denial of financial assistance. (Pet. App. A-21-22). Neither *Jones*, which held that parole satisfies the habeas custody requirement, nor *Hensley*, which held that a defendant released on his own recognizance satisfies the habeas custody requirement, is in conflict with the court of appeals' decision below.[5]

With regard to whether, custody aside, petitioners adequately alleged a bill of attainder, the court of appeals simply determined that the ordinance requiring the removal of unsafe housing applies to all residents along Territory Road, not just petitioners, and then applied *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425 (1977), which establishes that a bill of attainder must inflict punishment upon an identifiable individual or individuals. Petitioners argue that *Nixon* was misapplied in light of the particular facts they allege. Petitioners are plainly wrong, as they concede that the housing safety ordinance applies to everyone and that its application led to the condemnation and removal of other housing, including that of a member of the Nation's government (who, indeed, is one of the John Doe

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[5] *Dry v. CFR Court of Indian Affairs*, 168 F.3d 1207 (10th Cir. 1999), cited at page 30 of the petition, involved pretrial release in a tribal criminal case. The expansion of detention/custody that petitioners propose would have significant federalism implications. If petitioners were correct, then federal district courts would be asked to review final state court judgments involving allegedly politically motivated housing condemnation orders through habeas corpus petitions. *See Garry v. Geils*, 82 F.3d 1362, 1363, 1365 n.4 (7th Cir. 1996) (applying *Rooker-Feldman* doctrine to dismiss a § 1983 challenge to state condemnation order alleged to be an act of "political retaliation," and noting that habeas corpus is an exception to *Rooker-Feldman* prohibition against review of state court judgments); *Gisslen v. City of Crystal*, 345 F.3d 624 (8th Cir. 2003) (applying *Rooker-Feldman* to dismiss § 1983 suit challenging state condemnation action as retaliation for earlier protests against the city's actions).

respondents alleged to be a member of the Nation's Men's Council). Pet. 10. As for petitioners' additional argument that the Nation's decision to deny them subsidies and loan guarantees to facilitate construction of new housing, they identify no decision of this Court suggesting that such a denial can be a bill of attainder. *See Selective Service v. Minn. PIRG*, 468 U.S. 841 (1984) (denial of governmental benefit cannot be a bill of attainder).

III. PETITIONERS FAILED TO EXHAUST TRIBAL REMEDIES.

Petitioners boycotted tribal remedies. Because the district court dismissed, and the court of appeals affirmed, on grounds other than the failure to exhaust, neither reached this issue. The failure to exhaust would be, nevertheless, a reason for the Court to deny a writ of certiorari, even if the petition presented a question otherwise worthy of review.

There are three ways in which petitioners failed to exhaust tribal remedies.

First, petitioners refused to complete applications for first-rate housing in the Nation's new Village of the White Pines or at other Nation-owned properties, all presenting an opportunity where rent could be prorated based on the petitioners' financial means. (CAJA 79; Supp. SPA 8). As petitioners' arguments are tied heavily to allegations of homelessness, their failure to complete tribal applications for alternative housing undermines their claims regarding a bill of attainder and detention/custody.

Second, after receipt of the order of the Commissioner of Public Safety declaring petitioners' housing to be unsafe and subject to removal, petitioners were entitled to review in the Nation's Court, which they sought. Petitioners, however, never challenged the accuracy of the inspection reports finding unsafe the housing of all but one of them. Instead, they challenged

only "the legitimacy of the present Oneida Nation government and its leaders and the process by which the various housing ordinances were adopted." (CA SPA2 16). The Indian Civil Rights Act affords no right to live in unsafe housing.

Third, petitioners became members not in good standing, which is why they have not received the financial benefits they want, after participating in concerted action with members of a "Warriors" group that had previously committed arsons and assaults at the Nation. *See United States v. Markiewicz*, 978 F.2d 786 (2d Cir. 1992); *Oneida Indian Nation v. Hill*, Civ. No. 88-CV-29, 1990 U.S. Dist. LEXIS 10813 (N.D.N.Y. Aug. 15, 1990). All members who ceased to be in good standing were summoned to appear before the Nation's government to explain themselves and to be reinstated as members in good standing upon making a promise to work peacefully for political change and to renounce violence. Petitioners refused to appear when summoned. Those who did were reinstated to membership in good standing.

Thus, having boycotted tribal remedies that can provide alternative housing and reinstatement to good standing, and having failed in the tribal court to contest the finding that their housing is unsafe, petitioners cannot be entitled to the federal writ of habeas corpus they seek, even if they had adequately pleaded the other elements of a habeas corpus claim under the Indian Civil Rights Act. *Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 81 (2d Cir. 2001) (exhaustion rule "bar[s] interference by federal courts to defeat or circumvent the ongoing exercise of jurisdiction by tribal courts"); *Longie v. Pearson*, No. 99-4142, 2000 U.S. App. LEXIS 7255, at * 4 (8th Cir. April 21, 2000) (petitioner claiming illegal removal from position as Chief Judge must exhaust tribal remedies); *Harvey v. Star*, No. 95-2283, 1996 U.S. App. LEXIS 23870, at *6 (10th Cir. Sept. 10, 1996) (claim that tribal court exceeded jurisdiction in issuing custody order requires exhaustion of tribal remedies). *See also National Farmers Union Ins. Cos. v. Crow Tribe*, 471

U.S. 845, 856-57 (1985) (petitioners who challenge in federal court the jurisdiction of a tribal court to entertain a cause of action must first present claim to tribal court).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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